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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MATERIAL HANDLING EQUIPMENT
ERECTORS, INC. et al.,

Cross-complainants and Appellants,

v.

SAMUEL STRAPPING SYSTEMS, INC.,

Cross-defendant and Appellant.

E034430

(Super.Ct.No. RIC 351683)

OPINION

APPEAL from the Superior Court of Riverside County. Dallas Holmes, Judge.

Affirmed in part, reversed in part.

Kinkle, Rodiger and Spriggs and Bruce E. Disenhouse for Cross-complainants and Appellants.

Wasserman, Comden, Casselman & Pearson, Mark S. Gottlieb and Michael T. Fox for Cross-defendant and Appellant.

On September 27, 2000, Justin Judd, a truck driver, was severely injured when part of the load (8 bundles, each containing 15 uprights which were banded together with

banding material) he was hauling fell on him as it was being unloaded. On December 6, this action was initiated by Donna Judd, individually and as Guardian Ad Litem for Mr. Judd. Among the defendants named was appellant Material Handling Equipment Erectors, Inc. and Ken Christy (collectively MHEE). On October 5, 2001, plaintiffs identified Doe 5 as Samuel Strapping Systems, Inc. (Samuel). On October 23, MHEE, in turn, cross-complained against Samuel for indemnity, declaratory relief and contribution. Samuel's first appearance in this case came on November 26, 2001, when it filed its answer to plaintiffs' complaint. Mr. Judd died on March 5, 2002. Two days later, and only five months after being brought into the action, Samuel served an offer to compromise pursuant to Code of Civil Procedure section 998 (section 998) on MHEE.

Following the section 998 offer, discovery was conducted over the course of the next year. On February 19, 2003, Samuel moved for summary judgment against plaintiffs. According to the record before this court, plaintiffs did nothing to support their allegations against Samuel. Instead, when faced with Samuel's motion for summary judgment, plaintiffs responded by filing notice of their nonopposition. Empowered with plaintiffs' failure to pursue the claims in their complaint, Samuel moved for, and obtained, summary judgment against MHEE on May 21.

As the prevailing party on its motion for summary judgment, Samuel sought its costs and attorney fees. In support of its request, Samuel relied on MHEE's rejection of Samuel's section 998 offer and a cost memorandum identifying attorney fees and \$24,976 costs, including expert fees, under Code of Civil Procedure sections 1032 and 1033.5. MHEE moved to tax \$23,402.69 of the costs claimed by Samuel. After the trial

court granted in part and denied in part MHEE's motion to tax costs, Samuel was awarded \$22,043.85 costs, including expert fees as discretionary costs allowed under section 998.

MHEE challenges the award of expert fees on the grounds the trial court abused its discretion in awarding those fees as discretionary costs because Samuel's section 998 offer was unreasonable and made in bad faith. MHEE also claims the trial court abused its discretion in (1) taxing filing fees in the amount of \$405 out of a total requested of \$743, (2) failing to tax any portion of the \$8,541.75 requested for depositions, videotaping, compact disc recording, travel, lodging and meal expenses for depositions, and (3) taxing travel expenses in the amount of \$453.69, out of a total requested of \$604.94. Samuel counters the trial court properly exercised its discretion; however, in its cross-appeal, Samuel maintains that it was entitled to reasonable attorney fees based on Code of Civil Procedure section 1021.1 and estoppel.

AWARD OF EXPERT FEES

On March 7, 2002, five months after being brought into this action, Samuel sent to MHEE a section 998 settlement offer to "waive all recoverable costs it might be entitled to in this action, in exchange for" a dismissal with prejudice of the cross-complaint, a release of all claims, and each party bearing its own costs and attorney fees. MHEE did not accept the offer. Accordingly, the trial court found that Samuel was entitled to recover its expert fees following its successful motion for summary judgment against MHEE.

Section 998, subdivision (b) provides in part: “Not less than 10 days prior to commencement of trial . . . , any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. [¶] . . . [¶] (2) If the offer is not accepted prior to trial or arbitration, within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial or arbitration.” Subdivision (c)(1), in relevant part, provides: “If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant’s costs from the time of the offer. In addition, . . . the court . . . may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, . . . actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.”

“In reviewing an award of costs and fees under . . . section 998, the appellate court will examine the circumstances of the case to determine if the trial court abused its discretion in evaluating the reasonableness of the offer or its refusal. [Citations.] The purpose of . . . section 998 is to encourage the settlement of litigation without trial. [Citation.]” (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 152.) “‘As recognized in numerous Court of Appeal decisions, the clear purpose of section 998 . . . is to encourage the settlement of lawsuits prior to trial.’ [Citation.]” (*Burch v. Children’s Hospital of Orange County Thrift Stores, Inc.* (2003) 109 Cal.App.4th 537, 544.)

“[C]ourts determine the reasonableness of a section 998 offer—that is, whether it was rendered in good faith or was an invalid token offer—as of the time the offer was made. ‘The reasonableness of [section 998] offers must be made in light of the circumstances existing at the time of the offer [citation] and not by virtue of hindsight.’ [Citation.] ‘An offeree cannot be expected to accept an unreasonable offer. Hence, any subsequent punishment of the offeree for nonacceptance does not further the purpose of section 998, because the offeree would not have acted differently at the time of the offer despite the threat of later punishment. In these circumstances, later punishment of the offeree merely provides a windfall to the offeror and does not encourage settlements.’ [Citation.]” (*Burch v. Children’s Hospital of Orange County Thrift Stores, Inc.*, *supra*, 109 Cal.App.4th 537, 548.)

““As a general rule, the reasonableness of a defendant’s offer is measured, first, by determining whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known to the defendant. It goes without saying that a defendant is not expected to predict the exact amount of his exposure. If an experienced attorney or judge, standing in defendant’s shoes, would place the prediction within a range of reasonably possible results, the prediction is reasonable. . . . [¶] “If the offer is found reasonable by the first test, it must then satisfy a second test: whether defendant’s information was known or reasonably should have been known to plaintiff. This second test is necessary because the section 998

mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer.” [Citations.]” (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 135.)

In ruling on Samuel’s request for expert fees under section 998, the trial court stated: “First, on expert fees, when a defendant perceives itself to be fault free and has reasonably concluded that it has a significant likelihood of prevailing at trial, it’s permissible for the defendant to make a modest offer of settlement. You will find that in cases such as Culbertson versus A.D. Werner. But token or sham offers don’t roll out the 998 protection for expert fees. Those cases are cited in your pleadings.

“Whether a 998 offer was, quote, realistically reasonable, end of quote, depends on circumstances existing at the time the offer was made, not on hindsight under *Fortman . . . versus Hemco . . .* Under that case, we look at such things as the defendant’s apparent liability then, the plaintiff’s damages then, insurance coverage or lack thereof, historic patterns of jury verdicts, and the like.

“Samuel Strapping here decided early on this was a no liability case and made that offer based on that decision. The expert opinion confirmed it. The offer for waiver of costs turns out to have been worth about \$10,000, something I didn’t know before, and that kind of an offer of waiver of costs made at the initial stages of this litigation based on what was known then seems reasonable under the cases.”

At the time of the March 2002 offer, which was to have each party bear its own costs and attorney fees, dismiss the cross-complaint with prejudice, and release Samuel

from all claims, Samuel claimed that it had already incurred “recoverable costs” in excess of \$10,000.

MHEE claims that the trial court abused its discretion by not applying the proper analysis to determine whether the offer was made in good faith. It argues that the offer was inadequate because (1) Mr. Judd’s medical special damages were approximately \$900,000, (2) the offer was made two days after Mr. Judd’s death, and (3) the offer was made roughly five months after plaintiffs brought Samuel into the action and only limited discovery had been performed. Thus, MHEE argues that Samuel is not entitled to any award of trial costs under section 998. We agree.

Was Samuel’s offer reasonable at the time it was made? Did MHEE know, or should it have reasonably known, the information which Samuel possessed at the time of the offer? To answer these questions, we turn to the record. We know that Mr. Judd was injured on September 27, 2000. Plaintiffs initiated this action on December 6, 2000. While MHEE was initially named as a defendant, Samuel was not identified as a defendant until October 5, 2001. On October 23, 18 days later, MHEE amended its cross-complaint to identify Samuel as a cross-defendant. One month later, in November, Samuel initiated its discovery. Also during that same month the depositions of Ken Christy (of MHEE) and Jon Darling (of MHEE) were taken.

On December 20, 2001, Samuel sent a letter to another defendant in the action which indicates the results of tests performed by Samuel on its banding product. However, there is no indication that these tests included the banding which was used on

Mr. Judd's load. Instead, Samuel's counsel notes that he began making arrangements to have that banding tested in January 2002.

On January 23, 2002, Samuel sent its first set of special interrogatories to MHEE. Simultaneously, Samuel's counsel suggested that MHEE "dismiss the cross-complaints against Samuel [because] it appears that the only issue is that of comparative fault." Six days later, on January 29, the depositions of Joel Vickery (of Speedrack), Thomas Whitaker (general manager of Speedrack, another defendant), and Neil Masters (purchasing agent of Speedrack) were taken. During this same time, plaintiffs had failed to timely respond to the discovery requests of Samuel. Thus, Samuel's counsel sent letters to plaintiffs' counsel demanding responses without any objections.

Mr. Judd died on March 5, 2002. Two days later, March 7, Samuel sent its section 998 offer to MHEE. Nonetheless, plaintiffs had still not fully responded to Samuel's special interrogatories which were sent to them in November 2001. One interrogatory, number 57, specifically asked: "If **YOU OR ANYONE ACTING ON YOUR BEHALF** contend that any product provided by SAMUEL STRAPPING SYSTEM, INC. was in any way defective, please identify, by name, **ADDRESS**, and telephone number, each **PERSON** who has knowledge of each fact upon which you base such contention." In plaintiffs' responses, which were prepared on or about April 3, 2002, they stated: "Objection: The question seeks to ascertain information which an expert consultant witness has provided plaintiff in the preparation of her case and as such, violates the attorney work-product privilege. However, without waiving this objection,

Plaintiff responds as follows: Ken Christy, Steve Krall, Jon Darling, Steve O'Dette, Jim Derby.”

There is no indication in the record on appeal that the depositions of Steve Krall or Steve O'Dette were taken. Although the deposition of James Derby (president of MHEE) was taken, it was not taken until April 5, 2002. Furthermore, testing on the banding which was used on Mr. Judd's load was conducted that same month, April 2002. When plaintiffs finally responded to Samuel's request for admissions, it was February 12, 2003. In one request, Samuel asked that plaintiffs “[a]dmit that the **BANDING MATERIAL** did not possess a defect in design or manufacture when it left the possession of defendant SAMUEL STRAPPING SYSTEMS, INC.” In response, plaintiffs said that they were “[u]nable to admit or deny.”

On February 19, 2003, Samuel moved for summary judgment on plaintiffs' complaint. Samuel primarily relied upon plaintiffs' responses to Samuel's discovery requests. However, because plaintiffs failed to timely respond to such requests, they waived any objections. It is unclear whether plaintiffs' responses were factual, accurate, or merely the result of having failed to timely respond and conduct the necessary discovery to be able to respond. Moreover, Samuel chose not to rely on its expert's opinion of whether the banding material was defective. As Samuel stated in a footnote in its motion, “The banding material has apparently been in the possession of Speedrack or its counsel since shortly after the accident nearly two years ago. Counsel for Speedrack has made it available for testing, but no one other than Samuel has had it examined by an expert. Samuel has elected not to rely on the report of its expert for this motion for

summary judgment, because reliance on that report is unnecessary.” This court wonders why Samuel would choose not to rely on its expert opinion if the opinion conclusively determined that the banding was not defective.¹

On February 27, 2003, Samuel filed its motion for summary judgment against MHEE. Likewise, Samuel did not rely on its expert opinion regarding the banding. When MHEE noted that Samuel had “refused to provide this Court with alleged test results of the banding material involved in the incident[,]” Samuel replied that it “chose not to use this report for several reasons. Primarily, the report is *not needed*, given the absolute absence of any evidence of a product defect despite the passage of over two years since the lawsuit was commenced. Further, the use of such a report and declaration of Dr. Kashar would simply invite the creation of a counter-declaration from [MHEE] that may well have demonstrated a triable issue of fact.” (Italics added.)

Nonetheless, on May 8, plaintiffs filed their notice that they did not oppose Samuel’s motion for summary judgment. Subsequently, on May 21, Samuel obtained summary judgment on MHEE’s cross-complaint.

Given the above, we are unable to say that Samuel’s 998 offer was reasonable at the time it was made. Even if we were to find that it was reasonable, clearly, MHEE did not possess the information necessary to know that it was reasonable. (*Nelson v. Anderson, supra*, 72 Cal.App.4th 111, 135-136.) As of the time Samuel served its section

¹ In its other motions for summary judgment against other parties, i.e., cross-complainants, Samuel also chose not to rely on its own expert’s findings regarding the testing of the banding.

998 offer on MHEE, no expert had tested the banding used in Mr. Judd's load. Only a handful of depositions had been taken, and plaintiffs had not fully responded to Samuel's discovery requests. Plaintiffs did not provide their responses until April 2002 and February 2003. As of February 2003, plaintiffs themselves could not admit or deny whether the strapping was defective.

While hindsight shows that Samuel was successful in defending this action, the record suggests that such success was based on "factually devoid discovery responses." At the time the offer was made (March 7, 2002) Samuel had only been a party to the action for five months. While it had propounded discovery to plaintiffs, they failed to timely respond. The banding made by Samuel had not been tested. In fact, testing did not occur until April 2002. Given the above, we are unable to say that the conditional offer to waive all recoverable costs in exchange for a dismissal with prejudice of the cross-complaint, a release of all claims, and each party bearing its own costs and attorney fees was reasonable and made in good faith. Moreover, there is nothing to suggest that MHEE knew or reasonably should have known that the banding was not defective and that Samuel's offer was reasonable. As such, we conclude the trial court abused its discretion in evaluating the reasonableness of the offer. Accordingly, we reverse the trial court's decision to award expert fees to Samuel.

Notwithstanding the above, we find the decision to award such fees improper based on the language in section 998 and Samuel's counsel's declaration. According to section 998, "the court . . . may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, . . . actually incurred and **reasonably necessary**

in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.” (§ 998, subd. (c)(1), emphasis added.) Here, there is no evidence that the expert fees incurred by Samuel were reasonably necessary to support its motion for summary judgment against MHEE, or even plaintiffs. According to Samuel, it incurred \$11,028.32 in expert fees for the services of Kashar Technical Services, Inc. and Vollmer-Gray Engineering. However, as we noted above, Samuel chose not to rely on this expert’s opinion.

According to Samuel, it “elected not to rely on the report of its expert for [its] motion for summary judgment, because reliance on that report is unnecessary.” When MHEE questioned Samuel’s failure to rely on Dr. Kashar’s report, Samuel’s counsel responded: “I chose not to use this report for several reasons. Primarily, the report is *not needed*, given the absolute absence of any evidence of a product defect despite the passage of over two years since the lawsuit was commenced. Further, the use of such a report and declaration of Dr. Kashar would simply invite the creation of a counter-declaration from [MHEE] that may well have demonstrated a triable issue of fact.” (Italics added.) If Dr. Kashar’s report was “not necessary,” then section 998 does not apply. A trial court may only require a party to pay for another party’s expert fees if they were “actually incurred and **reasonably necessary** in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.” (§ 998, subd. (c)(1).) As Samuel admits, its expert’s report was “not necessary.”

Based on the above, we reverse the award of expert fees based on section 998.

MOTION TO TAX COSTS

“‘The right to recover costs exists solely by virtue of statute.’ [Citations.]” (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 989.) “Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” (Code Civ. Proc., § 1032, subd. (b).) “A cross-defendant in whose favor a dismissal of the cross-complaint is entered is the prevailing party. [Citation.]” (*Great Western Bank v. Converse Consultants, Inc.* (1997) 58 Cal.App.4th 609, 613.)

As already noted, Samuel was awarded \$22,043.85 in costs. Because we have already determined that the award of expert fees was improper, we are left with an award of \$11,015.53. Of that amount, MHEE now challenges \$338 in filing fees, \$8,541.75 for depositions, videotaping, compact disc recording, travel, lodging and meal expenses for depositions, and \$151.35 in travel expenses.

A. Filing Fees.

According to MHEE, the only filing fee which should not have been taxed was Samuel’s filing fee for the motion for summary judgment against MHEE in the amount of \$110. Looking at the list of Samuel’s filing fees, we find that the only fees which are recoverable costs against MHEE are those fees incurred as a result of MHEE suing Samuel. Here, such fees include \$27 for a May 1, 2002 “Motion to Compel MHEE/Christy,” \$110 for the February 25, 2003 “Motion for Summary Judgment against MHEE/Christy,” and \$58 as determined by the trial court to be that portion of the November 26, 2001 “First appearance” fee attributed to MHEE. As for the other filing

fees, Samuel is entitled to recover those costs from other parties. Regarding the July 10, 2002 “Motion to compel,” there is no indication in the docket statement as to whom this motion was directed to.

Accordingly, we conclude that MHEE is responsible for \$195, not \$338, in filing fees.

B. Deposition Costs.

Samuel sought deposition costs in the sum of \$8,541.75. Included in that sum is “Videos and CD’s of depositions of Speedrack personnel (Inv. #273)” in the amount of \$1,005. Samuel also sought reimbursement for the costs of its counsel’s meal expenses incurred in attending out-of-state depositions. Because the trial court found these expenses to be proper, the burden is on the objecting party to show them to be unnecessary or unreasonable. (*Nelson v. Anderson, supra*, 72 Cal.App.4th 111, 131.)

Regarding the expense of videos and CD’s of depositions, MHEE contends that the videotapes and CD’s were not reasonably necessary to the conduct of the litigation but merely convenient to Samuel. MHEE submits that because this matter never went to trial “the need for the ‘high tech’ cutting edge videotapes and compact discs were of no benefit” to Samuel. While MHEE’s argument sounds plausible, it has failed to sustain its burden of showing that the videos and CD’s were unnecessary or unreasonable. Absent such showing we find no abuse of the trial court’s discretion in awarding such cost.

As for meal expenses, MHEE claims that the trial court abused its discretion in awarding \$293.92 for the cost of meals while attending out-of-area depositions. It cites to *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774-775. In that

case, the court stated: “The only meal expenses statutorily allowable are those for jurors while they are kept together during trial and deliberation. [Citation.] While [Code of Civil Procedure] section 1033.5, subdivision (a)(3) allows the cost of *taking* and *transcribing* depositions and ‘travel expenses to attend depositions,’ it does not mention meals eaten while attending local depositions. Nor can meal expenses be justified as ‘necessary to the conduct of the litigation’ since attorneys have to eat, whether they are conducting litigation or not. At best, these expenses are ‘merely convenient or beneficial’ to preparation for litigation, the recovery of which is proscribed under section 1033.5, subdivision (c).” (*Ladas*, at pp. 774-775.) However, *Ladas* did not address meal expenses for nonlocal depositions. Instead, we must fall back on Code of Civil Procedure section 1033.5, subdivision (c) which allows the trial court to award such expenses in its discretion. As such, we reject MHEE’s argument.

C. Travel Expenses.

Samuel sought \$604.94 in travel expenses. The trial court acknowledged that Samuel was in the case not only because of MHEE, but also because of other parties. Thus, it apportioned one-fourth of the amount to MHEE, taxing travel expenses in an amount of \$453.69, leaving \$151.25 owed by MHEE. On appeal, MHEE challenges the trial court’s failure to tax all but \$57.80 in travel expenses.

It is within the trial court’s discretion to award travel expenses if they were “reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.” (Code Civ. Proc., § 1033.5, subd. (c)(2).) As we recognized with the filing fees, the only travel expenses which should be assessed against

MHEE are those incurred solely as a result of MHEE's cross-complaint. To the extent that Samuel incurred travel expenses because of MHEE's cross-complaint and the actions of the other parties, then the expenses should be apportioned. The trial court chose to apportion such expenses by fourths. We shall do the same.

Here, the only travel expense which appears to be solely the result of MHEE's cross-complaint is the attendance at the hearing on the motion for summary judgment in the amount of \$57.80. However, the following travel expenses appear to be the result of MHEE's cross-complaint and the actions of other parties: (1) Appearance for Status Conference on January 11, 2002 (\$37.92); (2) Appearance for Status Conference and MSJ on February 21, 2002 (\$58.58); (3) Appearance at JAMS for Mediation on May 1, 2002 (\$43.87); (4) Appearance for Status Conference on May 14, 2002 (\$59.58); (5) Appearance for Status Conference on January 15, 2003 (\$57.10); (6) Appearance at JAMS for Mediation on March 14, 2003 (\$14.76); (7) Appearance for Status Conference on March 17, 2003 (\$56.80); (8) Attend hearing on Preferential Trial Setting on March 18, 2003 (\$57.80); and (9) Travel to mediation on April 26, 2003 (\$43.87). The total of these expenses is \$430.28. A one-fourth of \$430.28 is \$107.57. When we add \$57.80 to \$107.57, we have a total of \$165.37 which should be assessed against MHEE. Thus, the trial court should have taxed the amount of \$439.57, instead of \$453.69.

ATTORNEY FEES

In its cross-appeal, Samuel asserts its right to attorney fees on two independent grounds, namely statute and estoppel. Code of Civil Procedure section 1021.1 provides that, when a party rejects a section 998 settlement offer and thereafter fails to obtain a

more favorable judgment, the trial court has discretion to award attorney fees to the party that made the rejected settlement offer. However, to recover under Code of Civil Procedure section 1021.1, there must have been a valid section 998 offer. (Code Civ. Proc., § 1021.1, subd. (c)(1).) Because we have already determined that Samuel’s offer was not reasonable at the time it was made, we conclude that Code of Civil Procedure section 1021.1 is inapplicable. Alternatively, Samuel argues that MHEE is estopped from opposing a request for attorney fees after losing a lawsuit where it requested attorney fees in its own pleading at the outset of the case. We address the merits of this issue.

According to Samuel, “[f]or at least twenty years, California courts have recognized that a litigant who requests attorneys fees **in its own pleading** is estopped to challenge an award of attorneys fees to its opponent after they prevail at trial.” In support of this claim, Samuel cites to the following cases: *Jones v. Drain* (1983) 149 Cal.App.3d 484, 490 (*Jones*); *Manier v. Anaheim Business Center Co.* (1984) 161 Cal.App.3d 503, 508 (*Manier*); *Leatherby Ins. Co. v. City of Tustin* (1977) 76 Cal.App.3d 678, 690 (*Leatherby*); *Sweat v. Hollister* (1995) 37 Cal.App.4th 603, 616 (*Sweat*), overruled on other grounds in *Santisas v. Goodin* (1998) 17 Cal.4th 599, 609, fn. 5; and *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1191 (*International Billing*).

Relying on the above five cases Samuel argues that the mere request for attorney fees in a pleading entitles the prevailing party to an award of attorney fees regardless of whether or not the action sounds in contract or tort. We, like the trial court, disagree. By claiming that “estoppel is created by the pleadings” Samuel misinterprets the case law.

Each of these cases involved a claim for attorney fees based on the fact that the action involved a contract with an attorney fees provision.

In *Jones*, the trial court found, as a matter of law, no contract existed and it denied the defendants request for attorney fees. Defendants appealed and the appellate court reversed. The appellate court held: “The courts have consistently held that the award of Civil Code section 1717 contractual attorney’s fees is to be governed by equitable principles. [Citations.] We believe that it is extraordinarily inequitable to deny a party who successfully defends an action on a contract, which claims attorney’s fees, the right to recover its attorney’s fees and costs simply because the party initiating the case has filed a frivolous lawsuit. As a consequence, we find that a prevailing defendant sued for breach of contract containing an attorney’s fees provision and having had to defend the contract cause of action is entitled to recover its own attorney’s fees and costs therefor, even though the trial court finds no contract existed.” (*Jones, supra*, 149 Cal.App.3d 484, 489-490.)

In *Manier*, a husband and wife sued the seller for breach of the real estate contract seeking specific performance or damages. While the husband had signed the agreement, the wife had not. Finding in favor of the seller, the trial court found that the contract had never come into existence and thus there was no right to attorney fees under Civil Code section 1717. On appeal, our colleagues in Division Three of this district reversed, holding that a nonsignatory plaintiff who sued on a real estate purchase agreement containing an attorney fee provision, and who alleged entitlement to attorney fees under

it, was liable for the attorney fees of the prevailing signatory defendant. (*Manier, supra*, 161 Cal.App.3d 503, 508.)

In *Leatherby*, a surety sued the City of Tustin under contractors' bonds for funds withheld from the contractor following its refusal to pay several laborers and suppliers. The surety was successful. As the prevailing party, the surety was awarded its attorney fees because the action was on the bonds both of which included a reasonable attorney fees clause. (*Leatherby, supra*, 76 Cal.App.3d 678, 690.)

In *Sweat*, real estate buyers sued the sellers and brokers alleging negligence and misrepresentation. Defendants prevailed on their motion for summary judgment and were awarded their attorney fees. On appeal, the appellate court affirmed the award of fees to the sellers but not the brokers on the grounds that the brokers were not parties to the contract which provided for attorney fees. The appellate court rejected the brokers' argument that they were entitled to their attorney fees because plaintiffs had requested such fees in the complaint. The *Sweat* court stated: "The mere fact that a plaintiff alleges an entitlement to attorney fees does not create an entitlement to same by a prevailing defendant; it is only when the plaintiff would have been entitled to fees had the plaintiff prevailed that a defendant will obtain a reciprocal right." (*Sweat, supra*, 37 Cal.App.4th 603, 616-617, fn. omitted, overruled on other grounds in *Santisas v. Goodin, supra*, 17 Cal.4th 599, 609, fn. 5.)

In *International*, the action was based on an alleged breach of trade secrecy by three former employees and others. Defendants prevailed and were awarded their attorney fees based on a provision in their employment agreement. In its discussion of

estoppel and the right to attorney fees, the appellate court noted: “We emphasize the following discussion applies only where a party brings a breach of contract action and the contract contains some provision which the party asserts operates as a fees provision.” (*International Billing, supra*, 84 Cal.App.4th 1175, 1187.) Because this case does not involve a breach of contract action, the discussion in *International* is inapplicable.

Clearly, a brief overview of the cases relied upon by Samuel demonstrates their irrelevance to the facts in this case. The action by MHEE against Samuel was not an action on a contract. However, Samuel was the prevailing party. When considering whether a prevailing party to an action is entitled to an award of attorney fees, “we turn to the California Supreme Court’s definitive seminal authority, *Reynolds Metals Co. v. Alperson* [(1979)] 25 Cal.3d 124. There, the plaintiff sued the shareholders and directors of a bankrupt corporate entity to which it had extended credit, part of which was evidenced by two promissory notes that included a provision for the recovery of attorney fees. The plaintiff pursued the action against the defendants as alter egos of the corporation. The plaintiff did not prevail on its alter ego theory and defendants were absolved of any liability to the plaintiff. The trial court awarded defendant attorney fees as the prevailing parties. An appeal was taken and the award was affirmed.

“*Reynolds Metals* is on point and instructive in two respects. First, it recites [Civil Code] section 1717 with italics to emphasize its application to “[an] action on a contract” and then explains that the statute is unclear whether the term ‘parties’ refers to signatories or to the litigants. [Citation.] In pertinent part, the court holds: ‘Its purposes require [Civil Code] section 1717 be interpreted to further provide a reciprocal remedy

for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant.' [Citation.] Undisputedly, the state's high court views the application of [Civil Code] section 1717 is restricted to actions on contracts.

"In addition, *Reynolds Metals* specifically holds: 'Where a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under [Civil Code] section 1717 only as they relate to the contract action. . . . A litigant may not increase his recovery of attorney's fees by joining a cause of action in which attorney's fees are not recoverable to one in which an award is proper. In this case, the two promissory notes contained contract provisions for attorney's fees, but no such provision existed in the general line consignment agreement. Accordingly, attorney's fees incurred solely for defending causes of action based on the latter agreement and defending against the tort causes of action are not recoverable.' [Citation.]" (*Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 785-786.)

For the above reasons, we conclude that Samuel is not entitled to recover its attorney fees based on an estoppel theory.

DISPOSITION

We reverse in part and affirm in part. We reverse the trial court's award of expert fees and we modify the award of costs as follows: (1) MHEE is responsible for \$195, not

\$338, in filing fees, and (2) MHEE is responsible for \$165.37, not \$151.25. As modified, we affirm the judgment. MHEE is to recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

WARD

J.

KING

J.